IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

TUESDAY, THE 6TH FEBRUARY 2007 / 17TH MAGHA 1928

CRL.A.No. 1063 of 2004()

AGAINST THE ORDER IN CRLP.387/2004 Dated 28/06/2004
ST.33/2003 of JUDL.MAGISTRATE OF FIRST CLASS COURT-I, KANNUR

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APPELLANT: COMPLAINANT:

RENJITH KUMAR, S/O. MUKUNDAN,
THROUGH HIS POWER OF ATTORNEY HOLDER
K.P. SREENIVASAN, S/O. CHATHUNNI, PAZHANKAVU,
VADAKARA.

BY ADV. SRI.C.MURALIKRISHNAN (PAYYANUR)

RESPONDENTS: ACCUSED & STATE:

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1. NALUMKKAL KUMARAN VIJAYAKUMAR,
NARAYANAMANGALAM, NEAR PULLOOT, KODUNGALLUR,
THRISSUR.

2. STATE OF KERALA,
REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

R1-BY ADV. SRI.R.RAGHUNANDANAN
R2-BY P.P.SRI.S. DILEEP

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD
ON 06/02/2007, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

K. THANKAPPAN, J.

Crl.A.No.1063 OF 2004

Dated this the 6th day of February, 2007.

J U D G M E N T

Appellant is the complainant in S.T.No.33/2003 on the file of the Judicial Magistrate of First Class-I, Kannur. As per the complaint, it is alleged that the 1st respondent had issued a cheque for an amount of Rs. Two Lakhs owed by him towards the appellant and when the cheque was presented for encashment the same was dishonoured on the ground that account of the 1st respondent did not contain sufficient amounts to pay the amount covered by the cheque. On the basis of the complaint filed by the complainant, summons has been issued to the 1st respondent and the case was adjourned to 9.3.2004. Since the 1st respondent did not appear on 9.3.2004, proceedings under Sections 82 and 83 of the Code of Criminal Procedure have been initiated against the 1st respondent and the case was posted to 30.4.2004. Since the appellant/complainant could not appear before the court as absented from appearance, the learned trial magistrate passed the impugned order by acquitting the 1st respondent.

The learned magistrate had stated that the complaint stands dismissed and the accused person is acquitted. A reading of the order impugned would show that the magistrate did not understand the difference between the order to be passed under Sections 204(2) and 256 of the Code of Criminal Procedure. However, this Court is inclined to read the order as passed under Section 256 acquitting the accused not dismissing the complaint. The counsel for the appellant submits that the order impugned is irregular and not in accordance with the dictum laid down by this Court in the judgments reported in **Don Bosco v. Partech Computers Ltd** (2005(2) KLT 1003) and **G.F.S. Chit & Loans (P) Ltd. v. Rajesh** (2006(3) KLT 825). The learned counsel also relied on the judgment of the Apex Court reported in **Associated Cement Co. Ltd. v. Keshvanand** (1998 (1) KLT 179 (SC).

2. The question to be decided in this appeal is whether the trial court is justified in passing the order under Section 256 of the Code of Criminal Procedure acquitting the respondent in the above case. It is come out in evidence that the complaint was taken cognizance by the magistrate and issued

summons to the 1st respondent. But the 1st respondent did not appear to the summons since the court itself had taken the proceedings under Section 82 of the Code of Criminal Procedure by issuing a warrant of arrest against the 1st respondent. Further, it has come out in evidence that the appellant was present before the court though out the case except on 30.4.2004 and on that day he could not appear before the court and his counsel also did not appear before the court. Only on the absence of the appellant, the trial court passed the impugned order acquitting the 1st respondent. Even though the learned trial magistrate tried to justify the order stating that there is no ground to adjourn the case further, the court below failed to take note of the fact that the court itself has issued a warrant under Section 82 compelling the presence of the 1st respondent before the court and in such circumstance, mere absence of the appellant is not a reason to pass an order acquitting the 1st respondent under Section 256(1) of the Code of Criminal Procedure. In **Associated Cement's Case** (cited supra), the Apex Court considered the circumstance under which an order under Section 256 (under 247) of the old Code could

be passed in the absence of the complainant. In the above judgment the Apex Court in Paragraph 17 of the judgment held as follows:

> "17. Reading the section in its entirely would reveal that two constraints are imposed on the court for exercising the power under the Section. First is, if the court thinks that in a situation it is proper to adjourn the hearing then the magistrate shall not acquit the accused. Second is, when the magistrate considers that personal attendance of the complainant is not necessary on that day the magistrate has the power to dispense with his attendance and proceed with the case. When the court notices that the complainant is absent on a particular day the court must consider whether personal attendance of the complainant is essential on that day for the progress of the case and also whether the situation does not justify the case being adjourned to another date due to any other reason. If the situation does not justify the case being adjourned the court is free to dismiss the complaint and acquit the accused. But, if the presence of the complainant on that day was quite unnecessary then resorting to the step of axing down the compliant my not be a proper exercise of the power envisaged in the section. The discretion must therefore, be exercised judicially and fairly without impairing the cause of administration of criminal justice".

3. Apart from the above judgment of the Apex Court, the view expressed by this Court on following the dictum laid down by the Supreme Court in **Don Bosco's** case is also relevant in which this Court had categorically stated that the magistrate

should apply his judicial discretion without requiring judicial caution by dismissing the complaint and by acquitting the accused is illegal. Further this Court in **G.F.S. Chits and Loan's case** (cited supra) held that the courts shall also bear in mind that unmerited, thoughtless disposal gives a wrong signal to the society, staking even public confidence in the system of administration of justice.

4. The case in hand would reveal that the magistrate had already issued steps under Section 82 of the Code and mere absence of the appellant/complainant is not amounts to pass an order under Section 256 of the Code. The court ought to have adjourned the case. That apart, the learned magistrate had stated that subsequent conducts of the appeallant is also a reason for passing an order under Section 256 of the Code. This Court is not in a position to understand why such observation is made by the magistrate without giving any subsequent opportunity to the appellant in the case. From the above circumstances and the reasons stated in this judgment, this Court is of the view that the judgment under appeal is liable to be set aside and the matter has to be sent back to the

trial court.

Consequently, the appeal is allowed, The judgment under appeal is set aside and the trial court is directed to proceed with the case from the stage of the acquittal order has been passed on issuing fresh steps under Section 82 against the 1st respondent. The appellant shall appear before the court below on 8.3.2007.

K. THANKAPPAN, JUDGE.

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